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Public School Assignment Methods After *Grutter* and *Gratz*: The View From San Francisco

by DAVID I. LEVINE*

I. Introduction

A few years ago, I chronicled my experiences and reflections as co-counsel in *Ho v. San Francisco Unified School District*.¹ This suit, filed in 1994, challenged the constitutionality of a 1983 consent decree, which had been the basis for settling a race discrimination case the San Francisco Branch of the NAACP had brought in 1978 against the San Francisco Unified School District.² The consent decree that the district court approved in 1983 mandated racial or ethnic quotas on the assignment of children to all public schools in San Francisco.³ The *Ho* suit generated

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1. David I. Levine, *The Chinese-American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 HARV. BLACKLETTER L.J. 39 (2000). The summary of the *Ho* suit presented here is based on that prior article.

2. *Id.* at 43-51.

3. See *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34 (N.D. Cal. 1983) (approving consent decree). The 1983 consent decree recognized nine racial

attention⁴ due to the novelty of having a group of Asian Americans challenging a court-ordered school desegregation plan.⁵

The *Ho* suit settled in early 1999, on the morning the trial was to begin.⁶ The key provisions of the settlement agreement were that the school district would immediately drop the use of quotas in assigning children to schools and that the district would develop a new student assignment plan which would not “assign or admit any student to a

and/or ethnic groups and provided that no one group would be allowed to constitute more than 45% of the enrollment at any San Francisco public school. *Id.* at 40-41. For other details of the 1983 decree, see Levine, *supra* note 1, at 46-48. The *Ho* action is often called the “Lowell High School case;” this is an inaccurate name because the *Ho* action challenged the assignment plan for all children in San Francisco’s more than 100 public elementary and secondary schools.

4. See, e.g., Levine, *supra* note 1, at nn.3-4 (citing popular and scholarly literature commenting upon the *Ho* case). As one student commentator put it more recently: “No other situation crystallizes the failure of constitutional colorblindness and the dilemma it creates for minority plaintiffs more than the Lowell litigation.” Note, *Taking Account of Another Race: Reframing Asian-American Challenges to Race-Conscious Admissions in Public Schools*, 86 CORNELL L. REV. 1283, 1288 (2001). Other recent publications commenting upon the suit include: IRIS CHANG, *THE CHINESE IN AMERICA* 332-33 (2003); FRANK WU, *YELLOW: RACE IN AMERICA: BEYOND BLACK AND WHITE* 141-42 (2002); Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived From Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 70-71 (2002); Juan Perea et al., *Thinking About Race and Races: Reflections and Responses*, 89 CAL. L. REV. 1653, 1661 (2001); Deborah Ramirez & Jana Rumminger, *Race, Culture, and the New Diversity in the New Millennium*, 31 CUMB. L. REV. 481 (2000-01); Eric K. Yamamoto, *The Color Fault Lines: Asian American Justice from 2000*, 8 ASIAN L.J. 153 (2001); Comment, *Acknowledging Those Stubborn Facts of History: The Vestiges of Segregation*, 50 UCLA L. REV. 1547, 1558-61 (2003); Comment, *Bilingual Education and Resegregation: Reconciling The Apparent Paradox Between Bilingual Education Programs and Desegregation Goals*, 7 ASIAN PAC. AM. L.J. 88 (2001); Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855, 858, 881 (2003) (book review); Adrien Katherine Wing, *Disoriented: Asian Americans, Law and the Nation State*, 99 MICH. L. REV. 1390 (2001) (book survey); Note, *Fatal in Fact? Federal Courts’ Application of Strict Scrutiny to Racial Preferences in Public Education*, 6 TEX. F. ON C.L. & C.R. 173 (2001); Note, *Integration Without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity*, 99 MICH. L. REV. 1999 (2001); Note, *Power, Merit, and the Imitations of the Black And White Binary in the Affirmative Action Debate: The Case of Asian Americans at Whitney High School*, 8 ASIAN L.J. 31 (2001).

5. Chinese American parents had been allowed to intervene in a much earlier school desegregation case in San Francisco. *Johnson v. S.F. Unified Sch. Dist.*, 500 F.2d 349, 352-54 (9th Cir. 1974). However, the case was abandoned subsequently by the African American plaintiffs in favor of the litigation that led directly to the current controversy. See Levine, *supra* note 1, at 42-43.

6. Levine, *supra* note 1, at 99-103.

particular school, class or program on the basis of race or ethnicity of that student.”⁷ The *Ho* plaintiffs, and later, the court, rejected the school district’s first proposed plan because it did not live up to the written agreement.⁸ In 2001, the school district ultimately gained the approval of all the parties and the court for a new race-neutral assignment plan.⁹ The new assignment plan has been used twice to assign students - for classes starting in the fall of 2002 and 2003 - and will be used again for fall 2004 assignments.

This Article turns in Part II to a discussion of the potential impact of *Grutter*¹⁰ and *Gratz*¹¹ on student assignment plans in public elementary and secondary schools. The cases draw a blurry line between permissible and impermissible admission plans in the higher education context. The resulting uncertainty may well lead public elementary and secondary school districts to conclude that it is prudent to use clearly race-neutral assignment plans rather than face the risk of having to defend a race-conscious plan through financially expensive and politically divisive litigation. If so, the experience in San Francisco may be instructive for other school districts as they attempt to formulate assignment plans that will both withstand constitutional scrutiny under *Grutter* and *Gratz* and will be politically palatable in their respective locales. Accordingly, Part III of the Article will detail the new assignment plan in San Francisco’s public schools and report on its mixed results. On the basis of two years’ experience, both the efficacy of the new assignment plan and its political viability are in question.

7. *S.F. NAACP v. S.F. Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1025 (N.D. Cal. 1999) (approving settlement).

8. See Levine, *supra* note 1, at 108-16; Memorandum Decision and Order, *S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78-1445-WHO (N.D. Cal. Jan. 19, 2000).

9. The new agreement also provided that the consent decree would terminate without need of further order of the court on December 31, 2005. Amended Stipulation and [Proposed] Order Re Modification and Termination of Consent Decree, *S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78-1445-WHO (N.D. Cal. July 11, 2001), available at <http://www.gseis.ucla.edu/courses/edlaw/701settlement.pdf> (last visited Feb. 1, 2004). After a fairness hearing, the court approved the new assignment plan and other related modifications of the consent decree on October 24, 2001. *S.F. NAACP v. S.F. Unified Sch. Dist.*, 2001 WL 1922333 (N.D. Cal. Oct. 24, 2001).

10. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

11. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

II. Public School Assignments in the Wake of *Grutter* and *Gratz*

In *Grutter*, Justice O'Connor's majority opinion permitted the use of race as a factor in admissions to the University of Michigan Law School. In *Gratz*, Chief Justice Rehnquist's majority opinion rejected the use of race in admissions to the University's College of Literature, Science and the Arts. The difference between what is permissible and what is not under these two opinions certainly leaves an opening under the federal constitution for race-based admissions decisions. However, the route through that opening may prove to be too slight for public elementary and secondary school systems to utilize for their student assignments.

Since at least 1995, it has become familiar constitutional law that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'"¹² Race-based action that is necessary to further a compelling governmental interest does not violate the constitution if it is narrowly tailored to meet that interest.¹³ Until *Grutter* and *Gratz* were decided, however, the lower courts were divided over which governmental policy goals could be deemed "compelling,"¹⁴ so that specific race-conscious means could be tested to determine whether they were "narrowly tailored," or sufficiently well crafted to achieve those goals.¹⁵

Although Justice O'Connor's opinion for the majority in *Grutter* asserted that "'searching judicial inquiry into the justification for such race-based measures'"¹⁶ is necessary, it appears that the search for a compelling governmental interest no longer need be a prolonged or arduous journey.¹⁷ Justice O'Connor took a rather open-ended view as to what constituted a compelling interest when she accepted the Law School's contention that it had a compelling state interest in attaining a diverse student body.¹⁸

12. *Grutter*, 539 U.S. at 331 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

13. *Id.* at 331.

14. Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260, 262 (2002).

15. As Ian Ayres has noted, narrow tailoring "is captured by the idea that remedial classifications should not be too overinclusive or underinclusive." Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1786 (1996).

16. *Grutter*, 539 U.S. at 331 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

17. See Bhagwat, *supra* note 14, at 263-71 (reviewing – prior to *Grutter* – lower court opinions ranging from restrictive to more open-ended positions on what constituted a compelling interest).

18. *Grutter*, 539 U.S. at 332.

Grutter held “that the Law School has a compelling interest in attaining a diverse student body,” because “attaining a diverse student body is at the heart of the Law School’s proper institutional mission.”¹⁹ As Professor Robert Post pointed out in his recent commentary on the cases, Justice O’Connor did not provide a precise description of that mission,²⁰ but simply referred to certain distinct objectives the Law School maintained flowed from racial diversity, including: (1) “producing students who are trained to function ‘as professionals’” because they will be “prepared to work within ‘an increasingly diverse workforce;’” (2) preparing “‘students for . . . citizenship’ as part of its ‘fundamental role in the fabric of society;’” and (3) training “‘our Nation’s leaders’” who will have “‘legitimacy in the eyes of the citizenry.’”²¹

It is possible subsequent judicial opinions will seek to limit the reach of *Grutter* and *Gratz* to the higher education context.²² For example, as Justice O’Connor observed: “We have long recognized that . . . universities occupy a special niche in our constitutional tradition.”²³ She also noted that in *Bakke*, Justice Powell supported the principle of student body diversity as a compelling interest by invoking “cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy” of universities.²⁴ A court might point to this tradition and conclude that public schools do not enjoy a special place in the constitutional pantheon.

It seems unlikely that the two cases will be read so narrowly, however. In all probability, a public elementary and secondary school district will

19. *Id.*

20. *Id.* at 349 (Thomas, J., concurring in part and dissenting in part) (“Unlike the majority, I seek to define with precision the interest being asserted by the Law School before determining whether that interest is so compelling as to justify racial discrimination.”).

21. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 58-59 (2003) (quoting *Grutter*, 539 U.S. at 332-36).

22. “[T]he Court’s decision in the University of Michigan cases will not necessarily determine the constitutionality of voluntary integration plans at the grade-school level, and . . . the very standards the Court will apply to those plans is uncertain.” James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1687 (2003) (written before *Grutter* and *Gratz* were decided).

23. *Grutter*, 539 U.S. at 332.

24. *Id.* (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978) (opinion of Powell, J.)). As Justice Kennedy noted, under *Bakke* there is “a basis for the Court’s acceptance of a university’s considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence.” *Grutter*, 539 U.S. at 370 (Kennedy, J., dissenting).

have little trouble asserting a compelling governmental interest in a diverse student body under the *Grutter* and *Gratz* opinions. Professor Wendy Parker has carefully examined the historical deference that courts have given to local school officials in “promoting the concept of local control over schools undergoing desegregation.”²⁵ She contends that the deference to higher education officials which was accepted in *Grutter* bears many similarities to the deference paid to local officials in public schools. In her view, “the judiciary’s limited competency in academic affairs, which includes most race conscious programs based on diversity, substantiates promoting deference.”²⁶

Professor Post apparently supports this position. He notes that although *Grutter* purports to simply adopt Justice Powell’s endorsement in *Bakke* of racial diversity in higher education, Justice O’Connor did not acknowledge how much her rationale for pursuing racial diversity actually differed.²⁷ For Justice Powell, “education was a practice of enlightenment, of speculation, experiment and creation that thrived on the robust exchange of ideas characteristically provoked by confrontation between persons of distinct life experiences.”²⁸ If the compelling interest in diversity is based solely on creating this dynamic educational process, “Powell’s explanation of the compelling interest of diversity did not reach very far beyond the specific context of higher education.”²⁹ However, Justice O’Connor’s explanations for why diversity is a compelling interest can “potentially reach far more widely than do Powell’s.”³⁰ If higher education is an institution which is “instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership,”³¹ than so are other institutions in society. According to Professor Post, the logic of the

25. Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1695 (2004). See also Suzanne E. Eckes, *How Will the Grutter and Gratz Affirmative Action Decisions Impact K-12 Diversity Plans?*, 29 T. MARSHALL L. REV. 1 (2003).

26. *Id.* at 66. Compare Comment, *The Case for the New Compelling Governmental Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923 (2002) (contending that courts will give deference to educational institutions that rely on educational research regarding the benefits of diversity) with Ryan, *supra* note 22, at 1675 (questioning whether courts will give deference to such studies, in part because “the research appears politicized”).

27. For discussion of how “diversity” became a rationale for race-conscious decision-making, see PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* (2003).

28. Post, *supra* note 21, at 60 (internal quotations omitted).

29. *Id.*

30. *Id.*

31. *Id.*

opinion suggests that “each American institution has a compelling interest in assembling a diverse and therefore legitimate set of leaders.”³²

Most importantly, the dissenters in *Grutter* seem to acknowledge this as well. Chief Justice Rehnquist, in the primary dissent joined by Justices Scalia, Kennedy and Thomas, noted that: “[a]lthough the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.”³³ Justice Scalia separately contended that if the Law School may use racial discrimination in order to “convey generic lessons in socialization and good citizenship,” so may others, such as Michigan’s civil service system or private employers.³⁴ Justice Thomas charged that: “[n]o serious effort is made . . . to place any theoretical constraints on an enterprising court’s desire to discover still more justifications for racial discrimination.”³⁵ Justice Kennedy objected that the majority “refuses to be faithful to the settled principle of strict review” which is needed in order to avoid having governmental “preferment by race . . . destroy confidence in the Constitution and in the idea of equality.”³⁶

The majority opinion in *Gratz* is yet more evidence that the Court will not hold *Grutter*’s endorsement of diversity to a narrow context. Chief Justice Rehnquist’s opinion in *Gratz* made no effort to assess the University’s proffered justifications for pursuing racial diversity in the admission of students to its College of Literature Science and the Arts. He did not ponder – or even leave the issue expressly open for future consideration – whether the rationale proffered for diversity to an elite law school’s entering class of 350 students applied with equal force to a much larger undergraduate program enrolling almost 4,000 entering students

32. *Id.* at 61. See also Robert P. George, *Gratz and Grutter: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1637 (2003) (noting that “the Court has put itself on the spot to identify a principled constitutional basis for deciding what is and isn’t a compelling governmental interest”). Courts are applying *Grutter* in exactly the manner that Professor Post predicted. *E.g.*, *Petit v. City of Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003) (compared to higher education, there is “an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago”), cert. denied, 2004 WL 875135.

33. 539 U.S. 306, 365 (2003) (Rehnquist, C.J., dissenting).

34. *Id.* at 345 (Scalia, J., concurring in part and dissenting in part).

35. *Id.* at 356 (Thomas, J., concurring in part and dissenting in part).

36. *Id.* at 371 (Kennedy, J., dissenting). For further discussion of the analysis and evidence presented in *Grutter*, and a review of the cases from *Bakke* to *Grutter*, see Note, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L. REV. 1171 (2003).

from an applicant pool of 13,500.³⁷ Chief Justice Rehnquist's opinion for the majority in *Gratz* simply noted that the *Grutter* majority rejected the contentions that race can be used exclusively to remedy identified discrimination or that diversity is "too open-ended, ill-defined, and indefinite to constitute a compelling interest."³⁸

In sum, after *Grutter* and *Gratz*, there seems little reason to believe that public school districts will see courts rejecting their attempts to rely upon diversity as a compelling rationale for adopting nearly any student assignment system they are likely to select. As one example, a district court writing shortly before *Grutter* and *Gratz* were announced held that the public elementary and secondary schools in Lynn, Massachusetts were permitted to take race into account in deciding whether to allow children to transfer from their neighborhood school to another school in the district. The trial court found that the school district had put forth compelling governmental interests in "preparing students to be citizens in a multiracial society and eliminating the concrete harmful consequences that *de facto* segregation inflicts on a public school system."³⁹ There is nothing in the subsequent opinions from the Supreme Court in *Grutter* and *Gratz* to suggest that this conclusion regarding the school district's assertion of compelling interests would be unwarranted now.

Although public school officials who desire to use race in making student assignment decisions will have little trouble articulating a compelling governmental interest after *Grutter*, this does not necessarily mean that they will be able to act upon that desire. If the officials seek to use race as an express means of selecting and assigning students, after *Gratz*, they will have significant difficulty meeting the narrow tailoring prong of the strict scrutiny analysis. As Justice O'Connor wrote in *Grutter*: "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial

37. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 814 (E.D. Mich. 2000), *rev'd in part* by 539 U.S. 244 (2003).

38. 539 U.S. 244, 280 (2003) (quoting Brief for Petitioners at 17-18, 40-41).

39. *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 371 (D. Mass. 2003). As to the former governmental interest, Justice Scalia may have inadvertently provided support to the idea that seeking diversity in public school in the name of making good citizens in a multi-racial society is a compelling governmental interest. Although he undoubtedly intended the comment to be ironic, he did say that, "cross-racial understanding" "is a lesson of life . . . taught to . . . people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School in institutions ranging from Boy Scout troops to public-school kindergartens." *Grutter*, 539 U.S. at 344 (Scalia, J., concurring in part and dissenting in part).

prejudice or stereotype.”⁴⁰ The Supreme Court majority of five concluded that the Law School’s admissions system “bears the hallmarks of a narrowly tailored plan.”⁴¹ The Law School’s stated goal of attaining a “critical mass of underrepresented minority students”⁴² did not “transform its program into a quota.”⁴³ The Court held that the Law School admissions program met Justice Powell’s criteria for a constitutionally viable plan. “[T]he Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”⁴⁴

On the other hand, in *Gratz*, the Court determined that Michigan’s undergraduate admissions program failed to meet the narrow tailoring test. Chief Justice Rehnquist’s majority opinion found that Michigan’s policy of automatically distributing twenty points (one-fifth of the points required to guarantee admission) to every member of the selected underrepresented minorities was not narrowly tailored to achieve the University’s interest in education diversity.⁴⁵ Justice O’Connor wrote separately to explain why she saw a distinction between the Law School’s admissions system and the undergraduate system. The undergraduate system’s “mechanized selection index score, by and large, automatically determines the admissions decision for each applicant.”⁴⁶ This index “precludes admissions counselors from conducting the type of individualized consideration the Court’s opinion in

40. *Grutter*, 539 U.S. at 335 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

41. *Id.* at 336.

42. *Id.* at 325. The Law School considered only “African-Americans, Hispanics and Native Americans” as groups which have been historically discriminated against. *Id.* at 324. Asians-Americans, for example, do not merit this treatment at Michigan. *Compare* *Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854, 863-64 (9th Cir. 1998) (detailing the “long history of governmental discrimination based on race [which] has marked the governmental treatment of persons of Chinese descent” and concluding “the Chinese children of San Francisco would have an excellent case for preferences compensating for earlier wrongs”).

43. *Grutter*, 539 U.S. at 337. Chief Justice Rehnquist spent considerable effort in his dissent showing that the admissions data in the record actually demonstrated that “the Law School has managed its admissions program, not to achieve a ‘critical mass,’ but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool.” *Id.* at 369 (Rehnquist, C.J., dissenting). The dissenters said that this amounted to “precisely the type of racial balancing that the Court itself calls ‘patently unconstitutional.’” *Id.*

44. *Id.* at 338.

45. 539 U.S. 244, 282-84 (2003).

46. 539 U.S. at 285.

Grutter . . . requires.”⁴⁷

One obvious result of the *Grutter/Gratz* split is “that trusted admissions officials are now freer to make their decisions without a great deal of transparency. They need not give reasons for their choices, as long as they avoid the mechanistic use of race.”⁴⁸ Indeed, despite the protestations of the University of Michigan that it was not practical for the undergraduate program to use the sort of admissions system the Law School utilized because of the much larger volume of applications,⁴⁹ the University has managed to do so in the wake of *Gratz*. Within two months of learning that its race-conscious points system was constitutionally impermissible, Michigan announced a new undergraduate admissions policy, which it designed to be in line with that permitted in *Grutter*. The points system has been eliminated, and the University says that it will “peer more deeply into the unique circumstances of each student.”⁵⁰ In order to provide the sort of holistic review approved in *Grutter*, Michigan is hiring twenty more readers and counselors at a cost of nearly \$2 million additional money that will be spent annually on the undergraduate admissions process.

The approved dividing line between acceptable and unacceptable race-conscious admissions systems will be of little consolation to public elementary and secondary school officials. What the Supreme Court has now pronounced to be constitutionally acceptable - and feasible - in the confines of the comfortable world of admission offices in the elite institutions of higher education is of little practical value in the real world of public school systems.⁵¹ Cash-strapped public school systems are

47. *Id.* at 286 (O'Connor, J., concurring). Justice Breyer joined Justice O'Connor in distinguishing the two programs on this basis. The other seven Justices found the programs indistinguishable - both were either constitutional (Justices Stevens, Souter and Ginsburg) or unconstitutional (Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas).

48. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 194 (2003). See also *Gratz*, 539 U.S. at 303 (Justice Ginsburg's observation: “[I]f honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”).

49. *Gratz*, 539 U.S. at 284.

50. Greg Winter, *U. of Michigan Alters Policy on Using Race in Admissions*, N.Y. TIMES, Aug. 29, 2003, at A12. See University of Michigan Undergraduate Application, Guidelines and Policies, available at <http://www.admissions.umich.edu/process> (last visited Feb. 1, 2004).

51. See also Guinier, *supra* note 48, at 185-86 (cautioning: “I take seriously Justice Thomas's suspicion of ‘know-it-all elites’ who attempt to make individual judgments without transparency or democratic accountability. And yet such a

unlikely to decide to devote significant sums to hiring professionals to staff huge admissions offices charged with conducting individualized reviews of student applications to the elementary and secondary schools in the system.⁵² And it borders on the absurd to imagine these hypothetical phalanxes of public school admissions officers purporting to conduct searching, individualized “holistic reviews” of detailed files of millions of four-year-olds applying to kindergartens across the country.

This means that, except in very limited cases,⁵³ public schools are going to have to continue to use relatively mechanical and routinized methods to assign students to schools. If they seek to incorporate race as a criterion for assignment in those systems, they will risk having to defend that choice in litigation.⁵⁴ In addition to creating systems that make

system seems to be exactly what Justice O'Connor had in mind.”).

52. As one example, San Francisco must place approximately 15,000 students annually into its system of over 100 schools. Most of these decisions are made at the ninth, sixth and kindergarten levels, although there are a substantial number of requests for transfers and for students new to the system at other grade levels as well.

53. For example, a school with a very special mission might have a genuinely individualized admissions system. In San Francisco, there are two high schools that do this. Lowell High School, the famous academic school, employs a race-neutral admissions system that bears a great deal of resemblance to a college admissions system. See STUART BIEGEL, SAN FRANCISCO UNIFIED SCHOOL DISTRICT DESEGREGATION PARAGRAPH 44 INDEPENDENT REVIEW REPORT NO. 19 at 83-84 (2001-2002) [hereinafter “2002 MONITOR’S REPORT”] *available at* <http://www.gseis.ucla.edu/courses/edlaw/sfrept19.pdf> (describing Lowell’s current system of admissions, which combines grades, standardized tests, and additional factors such as demonstrated ability to overcome hardship, participation in extracurricular activities, and whether the student is applying from a middle school which is underrepresented in admissions to the high school from the previous year). See also Ryan, *supra* note 22, at 1682 (“Examination schools use merit-based admissions policies, which typically rely on test scores as one factor in determining admission.”). The School of the Arts, a performing arts magnet school, requires an audition for admission. See JEFFREY R. HENIG & STEPHEN D. SUGARMAN, THE NATURE AND EXTENT OF SCHOOL CHOICE, IN SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 17-21 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (discussing magnet and other specialized schools). The plan recently approved in Lynn, Massachusetts, was a voluntary transfer plan available after all students were guaranteed assignment to their neighborhood schools. See *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 347-49 (D. Mass. 2003). See also James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2064-73 (2002) (discussing transfer programs).

54. For examples where school districts have been unable to satisfy courts that their race-conscious plans were narrowly tailored, see *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir.

individualized decisions, school districts will have to pass several additional hurdles to show that their admissions systems are narrowly tailored under *Grutter*. First, although they will not have to exhaust “every conceivable race-neutral alternative,”⁵⁵ they will have to demonstrate “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity” desired.⁵⁶ Second, the school district will have to demonstrate that the admissions system does not “unduly burden individuals who are not members of the favored racial and ethnic groups.”⁵⁷ Third, the school district must show that its race-conscious admissions system has a “termination point,”⁵⁸ a point in time when the race-conscious system would no longer be necessary or utilized.

Justice Scalia raised the specter that the “*Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.”⁵⁹ He speculated that future lawsuits will challenge whether particular plans fall under *Grutter* or under *Gratz*. For example, he imagined suits challenging whether there was sufficient individualized evaluation of applicants, whether there were actually separate admissions tracks for applicants of different races, whether a particular institution has crossed the line between seeking a critical mass and creating a *de facto* quota, whether any educational benefits flow from racial diversity in a particular setting, and whether particular institutions “talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism on their campuses with minority-only” organizations and programs. He also suggested that there would be suits — not unlike *Ho* — on behalf of groups “intentionally short changed in the institution’s

1998); Memorandum Decision and Order, *S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78-1445-WHO (N.D. Cal. Jan. 19, 2000). For a relatively rare example where school officials did make the requisite showing, see *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141, 1145 (D. Haw. 2003). In approving the race-conscious admissions plan, the court emphasized the “exceptionally unique circumstances” of a private school operating a remedial race-conscious admissions policy to rectify socioeconomic and educational disadvantage with the express encouragement of Congress because of the special trust relationship the United States maintains with indigenous Native Hawaiians. *Id.* See also John Tehranian, *A New Segregation? Race, Rice v. Cayetano, and the Constitutionality of Hawaiian-Only Education and the Kamehameha Schools*, 23 U. HAW. L. REV. 109 (2000).

55. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

56. *Id.* at 339.

57. *Id.* at 340 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

58. *Id.* at 341. Justice O'Connor suggested that twenty-five years might be an appropriate goal. *Id.* at 342.

59. *Id.* at 345 (Scalia, J., dissenting).

composition of its generic minority 'critical mass.'"⁶⁰ Justice Scalia professed that he did not look forward to these cases; it is a safe bet that many public school administrators – the future defendants—will not either.

Given these realities, one may assume that public school officials will search for race-neutral means to assign students, if those means hold at least some prospect of fostering diversity as well.⁶¹ The officials may conduct this search out of a number of motivations. Some officials may desire to avoid litigation, which even if successful, has the potential of being time-consuming and expensive.⁶² Others may search for a mechanism that is more politically palatable than an overtly race-conscious plan.⁶³ Other districts may have no choice but to seek race-neutral plans because they are located in places which forbid the sort of race-conscious plans *Grutter* and *Gratz* permit.⁶⁴ Still others will want to look at the experiences in other places in order to fulfill the mandate that they have considered "workable race-neutral alternatives" to race-conscious plans.⁶⁵

60. *Id.* at 346.

61. For a description of how the public schools in Boston, Massachusetts had to abandon illegal, race-conscious admissions procedures in favor of race-neutral ones. See, e.g., *Boston's Children First v. Boston Sch. Comm.*, 260 F. Supp. 2d 318 (D. Mass. 2003) (permitting school district to reduce the preference allotted to neighborhood children so that other children could apply for places in those schools, in the hopes of achieving racial diversity).

62. The *Comfort* case illustrates the point. Even though the district court upheld the small school district's limited transfer plan, it did so only after four years of litigation and after having heard from many defense witnesses who presented substantial evidence and data specifically on the Lynn Plan. The school district did not try to skimp by relying on "unsubstantiated generalizations about race relations, or the subjective perceptions of school officials. Nor did they rely on experts who knew everything about other systems in other parts of the country, but nothing about Lynn." *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 400 (D. Mass. 2003). Such a complete defense takes resources of time and money, which every district might not possess or care to devote to litigation rather than education. Compare *Tehrani*, *supra* note 53, at 109 (Kamehameha Schools can mount an expensive defense of their race-conscious admissions policy because among educational institutions, they have an endowment second only to Harvard's).

63. Guinier, *supra* note 48, at 185-86.

64. For example, no school system in California is free to create a race-conscious assignment system that might possibly thread the needle between *Grutter* and *Gratz*. They are forbidden to do so under Art. I, § 31 of the Constitution of California. See *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (2002) (rejecting high school transfer policy with a racial balancing component); Comment, *Proposition 209 and School Desegregation Programs in California*, 38 SAN DIEGO L. REV. 661 (2001).

65. *Grutter*, 539 U.S. at 339. For discussion of lotteries as an alternative, see Pauline T. Kim, *The Colorblind Lottery*, 72 FORDHAM L. REV. 9 (2003). Random assignments would be another race-neutral alternative.

All of these officials should be interested in the results from San Francisco as they ponder what to do about their own student assignment systems.

III. The San Francisco Experience

As indicated above, the San Francisco Unified School District has had some difficulty in creating a legal student assignment plan. The *Ho* suit challenged a 1983 court-approved student assignment plan that imposed quotas on the percentage of children of any one race or ethnicity that could attend any particular school.⁶⁶ The school district agreed to abandon this assignment plan in February 1999 and to develop a new assignment plan for admissions for the future.⁶⁷ In creating the new plan, school officials could consider many factors as aspirational goals in setting lawful criteria for admission, including racial and ethnic diversity, so long as these factors were not the "primary or predominant consideration in determining admission criteria."⁶⁸ Further, the new plan could not use race or ethnicity as a criterion for assignment or admission to a school, class or program.⁶⁹

As discussed in full elsewhere, in the fall of 1999, the school district submitted a plan, which it proposed to use for school assignments for the fall of 2000.⁷⁰ This plan proposed to use four factors in making admissions

66. S.F. NAACP v. S.F. Unified Sch. Dist., 576 F. Supp. 34, 40, 53 (N.D. Cal. 1983).

67. S.F. NAACP v. S.F. Unified Sch. Dist., 59 F. Supp. 2d 1021, 1025 (N.D. Cal. 1999). See also Levine, *supra* note 1, at 100-02.

68. The parties adopted this standard on the basis of voting districting cases such as *Miller v. Johnson*, 515 U.S. 900, 916 (1995), because of the expectation that the school district would try to achieve diversity by altering the attendance zones for various schools. Levine, *supra* note 1, at 109. For discussion of the standard in the voting context, see, e.g., Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569 (2002); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039 (1998).

69. Specifically:

The parties acknowledge that SFUSD officials have the duty and authority to determine lawful criteria for admission to all schools in the SFUSD. The parties further acknowledge that in setting those criteria, state and federal law provide that district officials may consider many factors, including the desire to promote residential, geographic, economic, racial and ethnic diversity in all SFUSD schools. However, race or ethnicity may not be the primary or predominant consideration in determining such admission criteria. Further, the SFUSD will not assign or admit any student to a particular school, class or program on the basis of the race or ethnicity of that student, except as related to the language needs of the student or otherwise to assure compliance with controlling federal or state law.

S.F. NAACP, 59 F. Supp. 2d at 1025 (¶C).

70. Levine, *supra* note 1, at 110-14.

decisions: (1) socioeconomic status; (2) proficiency in English; (3) math and reading achievement levels; and (4) race or ethnicity.⁷¹ After giving the school district ample opportunity to explain its plan - which appeared blatantly improper under the settlement agreement - or to reach an accommodation with the parties,⁷² the district court rejected the proposed plan in January 2000 as failing to meet both the constitutional test for strict scrutiny and the terms of the settlement agreement.⁷³

After the court rejected the proposed assignment plan in early 2000, the school district chose to replace the lead attorney who had represented the school district since 1978.⁷⁴ The school district also hired a new superintendent, Arlene Ackerman, who began work in August 2000.⁷⁵ She initiated a process to develop a comprehensive plan to address the various goals of the consent decree and to create a signature blueprint for her administration.

The plan, entitled "*Excellence for All: A Five-Year Comprehensive Plan to Achieve Educational Equity in the San Francisco Unified School District for School Years 2001-02 through 2005-06*" was filed with the court in April 2001.⁷⁶ After some negotiations, the parties resolved their differences regarding certain aspects of the *Excellence for All* plan, and submitted a settlement agreement to the district court for approval. The settlement agreement contained three major points.

First the parties agreed to extend the consent decree by three years, to December 31, 2005.⁷⁷ This secured funding from the State of California

71. *Id.* at 110-11 (describing San Francisco Unified School District, Proposed New Student Assignment Plan (Nov. 23, 1999), attached to Local School District Defendants' Resubmission of Proposed New Student Assignment Plan Pursuant to Order Filed November 2, 1999, S.F. NAACP v. S.F. Unified Sch. Dist., No 78-1445-WHO (N.D. Cal. Nov. 23, 1999)).

72. Levine, *supra* note 1, at 112 n.407 (noting how the court gave school district opportunity to show how plan was constitutional); *id.* at 113 n.412 (noting how the court ordered acting superintendent of schools and board members to meet with parties and mediator).

73. Memorandum Decision and Order, S.F. NAACP v. S.F. Unified Sch. Dist., No. C-78-1445-WHO (N.D. Cal. Jan. 19, 2000).

74. S.F. NAACP v. S.F. Unified Sch. Dist., 2001 WL 1922333, at *5 (N.D. Cal. Oct. 24, 2001).

75. *Id.* at *2. Superintendent Ackerman had been in Washington, D.C. for the prior two years. Justin Blum & Valerie Strauss, *Ackerman Quits As D.C. School Superintendent; Job in San Francisco Accepted*, WASH. POST, Mar. 18, 2000, at A1.

76. S.F. NAACP, 2001 WL 1922333, at *2. The *Excellence For All* plan is available at <http://www.sfusd.edu/news/pdf/X4Allrev021302.pdf> [hereinafter *Excellence for All Plan*].

77. As the court noted in approving the settlement agreement, the school

through the end of the 2005-06 school year to implement the decree.⁷⁸ Further, instead of making the termination "subject to Court approval,"⁷⁹ the new agreement provided that the consent decree would terminate on that date without need for a further order of the court.⁸⁰ To confirm the finality of that termination date, two defendants, the school district and the state superintendent of education, stipulated that they would oppose any future requests for extension of the court's jurisdiction.⁸¹

Second, the school district agreed to adopt a system of monitoring the expenditures of consent decree funds. The revised agreement specified that the priority for expenditures of consent decree funds would be directed to measures that would directly enhance student achievement.⁸² The

district's request for an extension of time was supported by several factors. First, was the sudden resignation of Superintendent Rojas shortly after the 1999 settlement was approved. This put school district leadership into uncertainty for a year. Second, the school district management had to spend considerable attention on financial matters. Third, was the delay caused by the litigation over the previous proposed assignment plan. Finally, there was the school district's change of counsel. All these factors "negatively affected the District's ability to move forward." *S.F. NAACP*, 2001 WL 1922333, at *5.

78. Subsequent legislation has insured at least partial state funding even after the consent decree terminates.

79. *S.F. NAACP v. S.F. Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1025 (¶A) (N.D. Cal. 1999).

80. See Amended Stipulation and [Proposed] Order Re: Modification and Termination of Consent Decree, *S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78-1445-WHO (N.D. Cal. July 11, 2001).

81. The *Ho* plaintiffs insisted on a termination date because it is consistent with the tenets of corrective justice, which assumes that courts will displace the usual policy makers for a limited time only. See Levine, *supra* note 1, at 140-42. Making the termination date even more certain than it had been previously, with the school district having the added condition of being forbidden from opposing the termination, was necessary in this case in recognition of the demonstrated reluctance of this school district and school districts in general from actually seeking termination of decrees. See Levine, *supra* note 1, at 124-29 (discussing "The Myth of the Desire for Return to Local Control"); Wendy Parker, *The Future of School Desegregation*, 94 N.C. L. REV. 1157, 1159-60 (2000) (Empirical work shows that, "Far from suggesting that school districts are clamoring for dismissal in great numbers (the common perception), these studies reveal that only a small percentage of defendants request an end to their desegregation lawsuits.").

Making termination a matter of *deus ex machina* also continued to avoid the problems of wrestling with the unknowns and logical problems of trying to meet the standards for showing that a school district has achieved unitary status. *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 246 (1991) (declining to define the term "unitary" precisely). See Levine, *supra* note 1, at 80-81, 122; Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1647 (2003); Ryan, *supra* note 22, at 1671-74.

82. See *S.F. NAACP*, 2001 WL 1922333, at *3; Amended Stipulation and

Independent Monitor, Professor Stuart Biegel of UCLA, agreed to conduct a review of the budget to evaluate the efficacy of the proposed expenditures in light of the consent decree priorities. The other parties were also given the right to object to specific budget items. Finally, an independent audit, conducted by state professionals, was to be instituted on a twice-yearly basis.⁸³

Third, and most important for present purposes, the settlement contained modifications to the consent decree regarding student assignment plans. The language banning assignment methods was strengthened to read: "[T]he SFUSD shall not use or include race or ethnicity as a criterion or factor to assign any student to any school, class, classroom, or program, and shall not use race or ethnicity as a primary or predominant consideration in setting any such criteria or factors."⁸⁴ As part of the

[Proposed] Order Re: Modification and Termination of Consent Decree, *S.F. NAACP v. S.F. Unified Sch. Dist.*, No-C-78-1445 (N.D. Cal., July 11, 2001).

83. All these measures were designed to ensure that the tens of millions of dollars of Consent Decree funds were expended properly. This was a matter of long-standing concern. See Levine, *supra* note 1, at 54 n.88, 85-86 n.266. See also STUART BIEGEL, SAN FRANCISCO UNIFIED SCHOOL DISTRICT DESEGREGATION, PARAGRAPH 44 INDEPENDENT REVIEW, REPORT NO. 15 at 131 (1997-1998), available at <http://www.gseis.ucla.edu/courses/edlaw/sfrept15.pdf> (report on *S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78-1445-WHO (N.D. Cal. July 31, 1998)); STUART BIEGEL, SAN FRANCISCO UNIFIED SCHOOL DISTRICT DESEGREGATION, PARAGRAPH 44 INDEPENDENT REVIEW, REPORT NO. 16 at 172 (1998-1999), available at <http://www.gseis.ucla.edu/courses/edlaw/sfrept16.htm> (report on *S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78-1445-WHO (N.D. Cal. July 29, 1999)); STUART BIEGEL, SAN FRANCISCO UNIFIED SCHOOL DISTRICT DESEGREGATION, PARAGRAPH 44 INDEPENDENT REVIEW, REPORT NO. 17 at 57 (1999-2000), available at <http://www.gseis.ucla.edu/courses/edlaw/Report17-SFUSD.pdf> (report on *S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78-1445-WHO (N.D. Cal. July 27, 2000)); STUART BIEGEL, SAN FRANCISCO UNIFIED SCHOOL DISTRICT DESEGREGATION, PARAGRAPH 44 INDEPENDENT REVIEW, REPORT NO. 18 at 66-76 (2000-2001) [hereinafter 2001 MONITOR'S REPORT], available at <http://www.gseis.ucla.edu/courses/edlaw/sfrept18.htm> (report on *S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78-1445-WHO (N.D. Cal. July 30, 2001)).

The budget oversight seems to be having its intended effect. See 2002 MONITOR'S REPORT, *supra* note 53, at 5-11 (report on *S.F. NAACP v. S.F. Unified Sch. Dist.*, No-78-1445-WHO (N.D. Cal. July 31, 2002)); STUART BIEGEL, SAN FRANCISCO UNIFIED SCHOOL DISTRICT DESEGREGATION, PARAGRAPH 44 INDEPENDENT REVIEW, REPORT NO. 20 at 12-13 (2002-2003) [hereinafter 2003 MONITOR'S REPORT], available at <http://www.gseis.ucla.edu/courses/edlaw/sfrept20.pdf> (report on *S.F. NAACP v. S.F. Unified Sch. Dist.*, No-78-1445-WHO (N.D. Cal. July 31, 2003)).

84. *S.F. NAACP*, 2001 WL 1922333, at *3. The agreement also creates a procedure for the parties to address identifiable racial or ethnic concentration at particular schools. *Id.* See Amended Stipulation and [Proposed] Order Re Modification and Termination of Consent Decree at 5-6, *S.F. NAACP v. S.F.*

settlement, the school district proposed a new system of student assignments to nearly all of the 114 schools in the system.⁸⁵

The new system uses a multi-step hierarchy of assignments, followed by the application of a complex multifactor Diversity Index.⁸⁶ The

Unified Sch. Dist., No. C-78-1445-WHO (N.D. Cal. July 11, 2001), *available at* <http://www.gseis.ucla.edu/courses/edlaw/701settlement.pdf>. However, no party has invoked the procedure to date and the school district has not made any effort to undertake the empirical work necessary as a predicate for proposing any such modifications.

Keeping the means of assignment race-neutral was important to the *Ho* plaintiffs for several reasons. First, it was a central goal of the lawsuit. “[T]he *Ho* plaintiffs think children should be treated as individuals, not according to whether their skin color or ethnicity will contribute to someone’s notion of the ideal distribution of races and ethnicities.” Levine, *supra* note 1, at 141. *See also* Memorandum Decision and Order, *S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78-1445-WHO at 33 (N.D. Cal. Jan. 19, 2000). Second, in view of the prior failure of the defendants to justify any race-based student assignment plan, there was no more legal justification for the court to approve one in 2001 than there was in 1999. *S.F. NAACP v. S.F. Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1029 (N.D. Cal. 1999). Finally, the *Ho* plaintiffs believed that the California Supreme Court’s strict interpretation of the ban on race-conscious programs approved by the voters through Proposition 209 meant that the school district would have to adopt a race-neutral plan as the parties contemplated how the school district would operate after the federal consent decree was lifted and the case was dismissed. *See Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000); Levine, *supra* note 1, at 134 n.526. This view of state law was confirmed when the California Court of Appeal subsequently held that Proposition 209 prohibited race-conscious school transfer programs, even if they might be permissible under federal law. *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275, 1285-86 (2002). *But see Friery v. L.A. Unified Sch. Dist.*, 300 F.3d 1120 (9th Cir. 2002) (certifying similar questions to the California Supreme Court).

Under the consent decree, the school district is still obligated to “eliminate racial/ethnic segregation or identifiability in any school, classroom, or program, and to achieve throughout the system, the broadest practicable distribution of students from all racial/ethnic groups comprising the general student population.” *S.F. NAACP*, 576 F. Supp. at 40, 53 (¶12).

85. Two high schools, Lowell and the School of the Arts, were not included in the assignment plan because of their special criteria for admission. *S.F. NAACP*, 2001 WL 1922333, at *3.

86. The agreement makes clear that the diversity index was the school district’s concept. *See Amended Stipulation and [Proposed] Order Re: Modification and Termination of Consent Decree at 4, S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78-1445-WHO (N.D. Cal. July 11, 2001), *available at* <http://www.gseis.ucla.edu/courses/edlaw/701settlement.pdf> (“The Assignment Method . . . was developed and adopted by the SFUSD, and the decision to use that particular Assignment Method was not taken at the request of any party or imposed by the Court.”). The index is described as Attachment B to the Agreement. *Id.* *See also* <http://www.gseis.ucla.edu/courses/edlaw/appv-01.htm> (Attachment B to Stipulation to 2001 MONITOR’S REPORT); <http://portal.sfusd.edu/template/default.cfm?page=policy.placement> (the school district’s website). Although the assignment system applies to all initial assignments and transfers, as a practical

assignment system operates as follows. Students are eligible to attend any school in the district.⁸⁷ First, applicants with a sibling already attending the desired school are admitted automatically. Second, students with specialized learning needs such as no proficiency in English or special education are assigned automatically to their desired schools with the program meeting those needs.

All students who are not assigned in either of these steps are assigned according to the six binary parameters comprising the Diversity Index.⁸⁸ Enrollment is determined from a pool of specific schools requested and ranked by the student.⁸⁹ Computerized Diversity Index calculations are made for each requested school as determined by the applicant pool it receives. Under the Diversity Index process, the school district calculates a numerical profile of all student applicants.⁹⁰ The current Diversity Index is composed of six binary factors: socioeconomic status,⁹¹ academic

matter, the primary points of entry into the SFUSD system are at kindergarten, sixth grade and ninth grade.

87. The school district dropped its older practice of automatically assigning students entering middle and high school into the school for that attendance zone. 2002 MONITOR'S REPORT, *supra* note 53, at 80. Thus, all children had to apply for assignment when changing schools.

88. This description of the mechanics of the diversity index is adapted from the 2003 MONITOR'S REPORT, *supra* note 83, at 26-28. The mechanics are also described in the *Excellence for All Plan*, *supra* note 76, at 96 *et seq.*

89. In the first two years of operation, students were allowed to rank up to five schools. See *Excellence for All Plan*, *supra* note 76, at 101. For fall 2004 admissions, students will be allowed to rank up to seven schools. See SAN FRANCISCO UNIFIED SCHOOL DISTRICT, FREQUENTLY ASKED QUESTIONS ABOUT S.F. UNIFIED SCHOOL DISTRICT'S "EDUCATIONAL PLACEMENT CENTER," available at <http://portal.sfusd.edu/template/default.cfm?page=policy.placement.faq> [hereinafter *Frequently Asked Questions*]. This change is designed to increase the number of students who get into a school of their choosing, even if it is a low priority school. For example, there are just ten basic high schools in the system.

90. The Diversity Index is an application of the statistical tools of permutations and combinations to multinomials to generate a statistical means for measuring diversity in any population. See *Excellence for All Plan*, *supra* note 76, at 102. It indicates the magnitude of diversity, as measured by the selected variables, within a group of individuals. *Id.* The Diversity Index is a measure of "how likely it is that two individuals selected at random out of a group will be of different types" in the selected variables. *Id.* The Diversity Index number is calculated between 0 and 1; "the higher the [index] score, the more diverse the group is with respect to the . . . [measured variables]." *Id.* "The lower the score, the less diverse the group is with respect to . . . [those variables]." *Id.* The Diversity Index is explained in *Excellence for All Plan*, *supra* note 76, at 102-03. The Diversity Index was derived by a consultant hired by the school district who based the statistical tool on Stanley Lieberman, *Measuring Population Diversity*, 34 AM. SOC. REV. 850 (1969).

91. The application form asks whether the student and/or family participate in:

achievement status,⁹² mother's educational background,⁹³ language status,⁹⁴ academic performance index,⁹⁵ and home language.⁹⁶

If there are more seats available at a grade level in a school than the number of applicants for that school, then the student is tentatively admitted. If the school is also the student's first choice, then the student is assigned to that school without the index having had any effect on the process. As indicated above, for more than 60% of the students, the operation of the index does not affect their school assignments.

If there are fewer seats available at a school than the number of applicants, then for each relevant class at that school, the Diversity Index process will be the basis for the assignment of students to that school. First, the school district's computer calculates a composite Diversity Index of the students already admitted to that class (for example because of the sibling preference) based on the six binary factors. Student applicants for each school who contribute the most mathematical diversity to the relevant class at that school are then admitted provisionally one at a time. The Diversity Index is recalculated each time a new student is admitted to the class and then the next student who contributes the most to diversity is admitted. This continues until the class is filled. The Diversity Index process is done twice. The first time is limited to students who live in the school's attendance area and who have listed the school as one of the desired choices.⁹⁷ The first run assigns attendance area applicants so long as they

free/reduced lunch programs, CalWORKS (public assistance), or lives in public housing. See *Excellence for All Plan*, *supra* note 76, at 101-03. A zero is assigned for purposes of the binary calculations if the student does not participate in any of these programs, and a one is assigned if he/she participates in at least one of these programs. *Id.* at 103.

92. For incoming kindergartners, a zero is assigned if the student has not attended preschool, and a one is assigned if he/she has. *Id.* at 101. For students entering first or second grade, the binary division is between those scoring at or above the 50th percentile on the Brigance test (zero) and those scoring below (one). *Id.* at 101-02. For all other grades, the division is between those scoring at or above the 30th percentile in reading and math on the SAT9 (zero) and those scoring below (one). *Id.* at 102.

93. If the mother attended any post-high school education, a zero is assigned. *Id.* If she did not, a one is assigned. *Id.*

94. If the student is proficient in English, a zero is assigned. *Id.* If not, then a one is assigned. *Id.*

95. If the API of the "sending school" (the school the student last attended or the student's neighborhood school if the student has not yet been to school) is ranked at 4 or above (on a scale of 10), then a zero is assigned. *Id.* If the school's API is below 4, then a one is assigned. *Id.*

96. If English is the primary language spoken in the student's home, then a zero is assigned. *Id.* If it is not, then a one is assigned. *Id.*

97. Attendance areas are largely, but not exclusively, contiguous to the school.

contribute to the diversity of the particular grade at the school. Once all students from the attendance area who contribute to diversity according to the index are admitted, then the second run commences. The second run is for all applicants - whether in the attendance area or not - who have not yet been assigned to the school. The computer uses the Diversity Index formula to determine which students in this pool will most contribute to the diversity of the grade in question in that school.⁹⁸

After these calculations, it is quite possible that students have been provisionally assigned to more than one school. If so, a reconciliation process places a student who has been admitted into more than one school into his/her most highly ranked choice.⁹⁹ The reconciliation process will open up places at other schools, so the computer will continue to use the Diversity Index to recalculate provisional assignments until as many applicants as possible are assigned to a school they have chosen. Students not assigned to a school of their choice are placed in a nearby school in which there is space available. The student is also permitted to choose another school with space available or to enter a waiting pool for spaces to open up in over-subscribed schools. As places open, the Diversity Index is run to select students to be assigned to schools with waiting pools.¹⁰⁰

The school district's system is a complex version of a controlled choice plan.¹⁰¹ The system does not use race as an express criterion for school assignments.¹⁰² Parents may select the schools from which the

See Excellence for All Plan, supra note 76, at 98. As a result of the 1983 consent decree, many schools have so-called "satellite zones," which are located in poorer areas of the city. *Id.* Students living in the satellite zones are given the same priority as students living in the contiguous attendance area. *Id.* This is another way in which the school district is attempting to foster economic and racial diversity.

98. In the event of a tie, the attendance area child will be given priority over a non-attendance area child; the attendance area child who ranked the school higher than another attendance area child will be given priority, and remaining ties will be resolved randomly. *See id.* at 100-01.

99. As originally conceived, the student admitted into more than one school would be admitted into the school to which he/she most contributed to the mathematical diversity of the school. *See id.* at 101. After the first year, this was changed in response to parental suggestion.

100. Also included are students who did not apply under the school district's initial application deadline. *See id.* at 101.

101. *See, e.g.,* RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 116-30 (Brookings Institute Press, 2001); CHARLES V. WILLIE & MICHAEL ALVES, CONTROLLED CHOICE: A NEW APPROACH TO DESEGREGATED EDUCATION AND SCHOOL IMPROVEMENT (1996).

102. *S.F. NAACP v. S.F. Unified Sch. Dist.*, 2001 WL 1922333, at *10 (N.D. Cal. Oct. 24, 2001) ("Each of the factors chosen by the District for use in its

district will endeavor to place their child; the assignment system puts priority on assignments which will keep siblings together and on assignments for students eligible for specialized programs such as for language immersion. The selected variables are directed at achieving diversity on the basis of social class, educational level, and language. Some of these factors may be somewhat correlated with race (for example, eligibility for public housing), but it cannot be said that, taken as a whole, the primary or predominant consideration behind selecting this particular group of variables is race.¹⁰³ Rather, the overall aim of the district is to balance parental desires while enhancing diversity as measured by the selected variables.¹⁰⁴

The school district's goal is in line with the arguments of those academic writers who believe that seeking socioeconomic integration of public school populations is the most feasible way to achieve diversity in an era which has probably neared the legal and political limits of using racial desegregation strategies in public schools.¹⁰⁵ Richard Kahlenberg, who is probably the most prominent advocate of this approach, has discussed these limitations in his 2001 book, *All Together Now: Creating Middle Class Schools Through Public Choice*.¹⁰⁶ He contends that

diversity index can apply to students of any race or ethnicity.”).

103. For example, having two of the six variables concerned with language would seem to emphasize whether a child's family recently immigrated to the United States (whether from Latin America, Asia or Eastern Europe), rather than race per se. Similarly, measuring the mother's educational level as having merely completed high school or not seems more correlated with social class than with race.

104. See *Excellence for All Plan*, *supra* note 76, at 99 (“[I]n some instances, educational harm can result from having high concentrations of students with particular characteristics - for example high concentrations of students who are less prepared or who have fewer familial resources to support the educational process are likely to have a negative impact on the academic performance of *all* students in the school.”).

105. Richard Kahlenberg has hailed San Francisco's attempt to create an assignment plan based on socio-economic variables as “extraordinary” and “groundbreaking.” Richard D. Kahlenberg, *Economic School Desegregation*, EDUC. WK. 52 (Mar. 31, 1999).

106. In addition to his recent book on socio-economic integration in public schools, Kahlenberg, a scholar at the Century Foundation, has also advocated class-based admissions to selective high schools and colleges. RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996). Others advocating similar approaches include: WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* (1987); Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913 (1996); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334 (2004). See also Sara Rimer, *Schools Try Integration by Income, Not Race*, N.Y. TIMES, May 8, 2003, at A1.

continuing to base school desegregation upon race has at least four major limitations. As a legal strategy, the Supreme Court's cases have made it very difficult to utilize race as the basis for a student assignment system.¹⁰⁷ Second, the focus on race misses what Kahlenberg believes is the "key element" educationally, which is that the life chances of students are improved only with economic integration.¹⁰⁸ Third, he argues that the focus on racial desegregation makes the insulting assumption that predominantly African American schools must be bad.¹⁰⁹ Finally, Kahlenberg observes that the focus on racial desegregation has turned working class whites and African Americans into political adversaries.¹¹⁰ Kahlenberg and his intellectual allies¹¹¹ contend that schools that use economic integration have a chance to create middle class environments for the benefit of all students.¹¹²

Whatever benefits may accrue from economic integration of schools in theory, however, the actual success of the Diversity Index in San Francisco to date is very much a matter of point of view. As the independent monitor reports, experience had shown that at least 60% of the schools in the district are able to accommodate all of the students requesting that school.¹¹³ The school district reports a similar finding by stating that 63% of all applicants received their first choice assignment.¹¹⁴ With parents able to select up to five choices¹¹⁵ for their children, the school district reports that over 80% of students are assigned to a school of their choice.¹¹⁶ From a mechanical point of view, the Diversity Index works

107. KAHLENBERG, *supra* note 101, at 90-93.

108. *Id.* at 90, 93-95.

109. *Id.* at 90, 95-96. See also *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominately black must be inferior.").

110. KAHLENBERG, *supra* note 101, at 90, 96.

111. See, e.g., Lowell P. Weicker & Richard D. Kahlenberg, *The New Educational Divide*, CHRISTIAN SCI. MONITOR, Oct. 9, 2002, at 9.

112. KAHLENBERG, *supra* note 101, at 76; see generally KAHLENBERG, *supra* note 106.

113. 2003 MONITOR'S REPORT, *supra* note 83, at 29.

114. S.F. UNIFIED SCHOOL DISTRICT, STUDENT ASSIGNMENT PROCESS, available at <http://portal.sfusd.edu/template/default.cfm?page=policy.placement.process> (last visited Feb. 1, 2004). The school district reports that for the fall of 2003, 67% of kindergarten students, 73% of sixth grade students and 64% of ninth grade students received a placement offer to their first choice school. *Id.*

115. For fall 2004, this has been expanded to seven choices. See <http://portal.sfusd.edu/template/default.cfm?page=policy.placement.faq> ("Frequently Asked Questions" about S.F. Unified School District's "Educational Placement Center").

116. The school district's web site indicates that 82% of students are assigned to

statistically to make the entering classes of students as diverse as possible, given the parameters of other school district policies, such as granting automatic admission to siblings and drawing the classes from parent-generated pools of applicants for particular schools.¹¹⁷ Under the Diversity Index process, however, the student body of any particular school can be no more diverse than the original pool applying for that school.

On the other hand, the monitor's annual reports also show that the Diversity Index system has some serious flaws. Parents, teachers, students and school administrators frequently observe that the Diversity Index is incredibly complex to explain and comprehend,¹¹⁸ a finding, which I confirm repeatedly as I communicate with frustrated parents. When something as important as school assignments is at stake, having a complex system does not alleviate anxiety. Further, many people assume that the binary variables of the Diversity Index operate as a point system, so they see their children as being penalized because of their success.¹¹⁹ The

a school of their choice under this system. <http://portal.sfusd.edu/template/default.cfm?page=policy.placement.process> (Student Assignment Process). The district reports that for the fall of 2003, 87% of kindergartners, 91% of sixth grade students and 81% of ninth grade students received a placement offer to a school of their choice. LOCAL DEFENDANTS' 2002-2003 ANNUAL REPORT at 15 [hereinafter "LOCAL DEFENDANTS' REPORT"] (filed in S.F. NAACP v. S.F. Unified Sch. Dist., No-78-1445-WHO (N.D. Cal. Aug. 15, 2003)).

The fall 2003 placement data show that substantial numbers of students of all racial groups were assigned to one of their schools of choice:

Ethnicity	Kindergarten	Sixth Grade	Ninth Grade
African American	90.6%	81.1%	85.5%
Chinese	90.2%	94.1%	76.2%
Latino	86.1%	89.4%	84.7%
Other White	71.5%	86.6%	59.5%

LOCAL DEFENDANTS' REPORT, *supra*, at 15-16. The four groups constitute the vast majority of students in the district. See *infra* note 122.

117. LOCAL DEFENDANTS' REPORT, *supra* note 116, at 19-21.

118. See, e.g., 2002 MONITOR'S REPORT, *supra* note 53, at 96 n.71. See also S.F. NAACP v. S.F. Unified Sch. Dist., 2001 WL 1922333, at *10 (N.D. Cal. Oct. 24, 2001).

119. For example, the index assigns zeroes when a child's mother has post-high school experience, when a child comes from a stronger academic school, has higher achievement scores, is not eligible for public assistance, is English proficient and speaks English at home. See *Excellence for All Plan*, *supra* note 76, at 102. The index assigns ones to the opposite categories. *Id.* Although this is done arbitrarily for the purposes of the binary calculations, the fact that the district has chosen to label these categories as "zeroes" and "ones" adds to confusion and

system depends on children applying to school in a timely fashion, so extensive outreach is needed to inform parents that they need to apply.¹²⁰ It is particularly difficult to encourage parents who do not already have children attending schools in the district to apply in a timely fashion. There is no systematic way for the school district to know who - such as children who would be applying for kindergarten - might be eligible to attend its schools nearly a year in advance.

The monitor's reports have raised other issues with respect to the results under the Diversity Index. The monitor noted that the Diversity Index has not reversed what he labels "severe resegregation" of racial groups.¹²¹ His most recent report predicted that approximately one-third of the entering classes (kindergarten, sixth and ninth grades) will have student bodies with at least 60% of one recognized race or ethnicity.¹²² He also noted that in some instances, the composite Diversity Index score shows that certain schools are nearly perfectly diverse (according to the variables

suspicion about the fairness of the system because it looks like a point system in which certain children are being penalized for being middle class.

120. See 2002 MONITOR'S REPORT, *supra* note 53, at 97. See also LOCAL DEFENDANT'S REPORT, *supra* note 116, at 10-12 (detailing the school district's efforts at outreach).

121. The Monitor has adopted his own standard of labeling a particular school as "severely resegregated" if 60% or more of an entering class will consist of children of one race or ethnicity. See 2003 MONITOR'S REPORT, *supra* note 83, at 24. While this has been his personal practice, the figure seems to have been derived arbitrarily. Other school districts use different figures. See e.g., *Comfort v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 348 (D. Mass. 2003) ("By the Lynn Plan's definitions, then, an elementary school that enrolled between 43% and 73% minority students would qualify as racially balanced."). As one commentator on the San Francisco consent decree noted, it is "inaccurate and patently unfair to portray the exercise of parental choice for the neighborhood schools as a phenomenon like 'resegregation.'" *DIALLO DPHREPAULEZZ, CONSENT DECREE REVISITED IN SAN FRANCISCO UNIFIED 8* (Pacific Research Inst., 2002) (quotation in the original), available at http://www.pacificresearch.org/pub/sab/educat/Consent_Decree.pdf.

122. 2003 MONITOR'S REPORT, *supra* note 83, at 24 ("And the most recent student assignment figures for Fall 2003 show that 35-38 schools [out of 114 schools] are now projected to be severely resegregated (60 % or higher of one race/ethnicity) at one or more grade levels"). The current student body is approximately 58,000. *Id.* at 14. The racial make-up, in order from largest to smallest, is: Chinese (31.2%); Latino (21.2%), African-American (14.5%); "Other Non-White" (11.9%); "Other White" (10.0%), Filipino (6.6%); Korean (0.9%); Japanese (0.9%); Native American (0.6%). *Id.* at 15. When the consent decree was originally approved in 1983, the student body consisted of approximately 65,000 students. At that time, the racial make-up, in order, was African American (23.1%); Chinese (19.5%); Latino (17.2%); "Other White" (16.9%), "Other Non-White" (11.9%); Filipino (8.7%); Korean (1.0%); Japanese (1.1%); Native American (0.6%). *Id.* at 15 (citing *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34, 37 (N.D. Cal. 1983)).

measured in the Index), yet are “severely segregated” by race.¹²³ On the other hand, with respect to children of low socioeconomic status, there is evidence to indicate that they are located throughout the district and that the district as a whole represents a fairly low SES population.¹²⁴

There are many possible reasons for these results. Probably the most important is the fact that, in common with many other cities, San Francisco’s neighborhoods are often segregated due to housing patterns.¹²⁵ The situation is particularly stark in the southeast quadrant of the city, where the population is disproportionately Latino and African-American.¹²⁶ The schools located in those neighborhoods draw students from the immediate area almost exclusively. Many of these schools are under-subscribed (the population of the entire district is dropping due to economic factors such as the high cost of housing in San Francisco) but do not draw significant numbers of applicants from other parts of the city. Therefore, the Diversity Index has virtually no impact on assignments to those schools.¹²⁷ The monitor has observed that students from this relatively isolated location often lack convenient transportation to more desirable schools, which are located across the city.¹²⁸ Thus, the “striking dearth” of African-American and Latino students in high performing schools located far from where they live is largely caused by the dearth of applicants of those ethnicities to those often distant schools.¹²⁹ If those students would choose to apply to, and attend, the high performing schools, their contribution to diversity according to the non-racial criteria measured by the school district’s Diversity Index would probably give them an excellent chance of being admitted to those schools.

The monitor has called upon the school district and the parties to reexamine the efficacy of the Diversity Index in light of the results summarized here. The monitor has urged consideration of a variety of

123. 2003 MONITOR’S REPORT, *supra* note 83, at 31-33. The Monitor also notes that because of the numbers of students utilizing their option to decline to state their race, there may be even more schools that he would have placed in his “severely resegregated” category. *Id.* at 42.

124. *Id.* at 47.

125. See Alfred A. Lindseth, *A Different Perspective: A School Board Attorney’s Viewpoint*, 42 EMORY L.J. 879, 882 (1993) (“In reality, school boards have little – or nothing – to do with most of the school segregation that lingers today. . . . Where one-race schools persist today, they do so because of housing patterns, with little or no causal relationship to the former dual school system.”).

126. 2003 MONITOR’S REPORT, *supra* note 83, at 61.

127. *Id.* at 59.

128. *Id.* at 77 *et seq.*

129. *Id.* at 63. There is a general pattern in the city that families tend to choose neighborhood schools wherever they happen to live. See *id.* at 65.

options including changing or replacing the Diversity Index, altering transportation services, changing programmatic offerings such as where bilingual and special education programs are located, upgrading after school programs and improving outreach.¹³⁰ So long as race is not used as a criterion for assignments or race does not become the primary or predominant consideration for making changes, the *Ho* plaintiffs are neutral on these matters.¹³¹ A basic tenet of the litigation posture of the *Ho* plaintiffs is that school district officials have the authority to make decisions that they believe are educationally sound, within the legal limits set by federal and state law.

The monitor has not discussed another issue in his annual reports that has caused consternation among some parents. Although the monitor is correct to point out that many schools are under-subscribed, the monitor has not dwelled to any degree on over-subscribed schools. A relative handful of schools are extremely popular; they attract many more applicants than they can possibly serve.¹³² The parents who have applied to these schools - and whose children do not get in to any of their high-choice schools - conclude that the Diversity Index has not served them well.¹³³ A few of the parents who have been made especially upset by the school

130. *Id.* at 85-86.

131. *See, e.g.,* Levine, *supra* note 1, at 134 ("Although the settlement bans race-conscious assignment 'criteria' (or means), it affirms the appropriateness of 'residential, geographic, economic, racial and ethnic diversity' as 'considerations' (or goals) within the limits provided by state and federal law."); *id.* at 140 ("In effect, the *Ho* plaintiffs are saying that the proper place to seek distributive justice is in the school district itself, with policy set within legal limits by an elected school board that is highly representative of and responsive to San Francisco's populace.").

132. *See* LOCAL DEFENDANTS' REPORT, *supra* note 116, at 16-18. The report indicates that the most popular schools receive as many as nine to fourteen requests for every available place in their respective entering classes. *See id.* (For example, Clarendon Elementary School received "906 requests for 101 seats" and Wallenberg High School received "2315 requests for 160 seats.").

133. This is a clear example of a well-understood phenomenon involving the difficulty of achieving successful social change in any setting. As two psychologists explain:

A program targeted for change always functions in a social context defined by sets of positions and roles within the organization and by institutions and constituencies (e.g., parents of school children) that make up the external environment. . . . Members of role groups stand to gain or lose when a change is proposed or implemented. Potential losers will oppose change, either actively or passively, but they may not have the power to defeat or retard the changesignificantly. Potential gainers will support the change.

MURRAY LEVINE & DAVID V. PERKINS, PRINCIPLES OF COMMUNITY PSYCHOLOGY 351 (2d ed. 1997).

district's policies have resorted to political tactics to make their point.¹³⁴ Many parents find the complex and mechanistic quality of the Diversity Index to be especially off-putting. They believe that the school district's purpose in adopting the Index was to distribute higher performing children to far away¹³⁵ and lower performing schools, which they see as detrimental to the interests of their own children.¹³⁶ Their suspicions are further aroused when school district officials obfuscate the truth by not making it clear in documents and meetings that the district itself is responsible for the creation of the Diversity Index.¹³⁷

The superintendent and the school board members are well aware of these negative feelings towards the operation of the Diversity Index.¹³⁸ The superintendent has proposed the creation of a broadly representative committee of school district staff and parents which she would assign the task of reviewing the Diversity Index and recommending how the student assignment system should operate after the consent decree expires at the end of 2005. The *Ho* plaintiffs plan to participate and eagerly await the

134. See, e.g., May Chow, *Parent Group Fights for Neighborhood Schools*, ASIAN WEEK, Sept. 18, 2003, at 14; Ray Delgado, *Parents Storm Ackerman's Office*, S.F. CHRON., May 20, 2003, at A13; Heather Knight, *Chinese Americans End School Protest*, S.F. CHRON., Oct. 3, 2003, at A21; Tiffany Maleshefski, *School Placement Uproar – Again*, THE INDEPENDENT, Aug. 24, 2003, at 1A; Joan Walsh, *John Zhao's Crusade*, S.F. CHRON., Sept. 2003, at 60.

135. See Joan Ryan, *She's Not Allowed to Walk to School*, S.F. CHRON., Oct. 21, 2003, at A15.

136. They also fear violence at certain schools. Heather Knight, *Schools May Start Checking for Weapons*, S.F. CHRON., Nov. 26, 2003, at A19 (after student killed by another student on a public bus going home from school); Jaxon Van Derbeken, *Four Held in Attack at S.F. High School*, S.F. CHRON., Jan. 17, 2004, at A13 (alleged sexual assault of 14-year-old girl in school bathroom).

137. For example, the school district's web site claims that the Diversity Index is "required by the October 24, 2001 court order." <http://portal.sfusd.edu/template/default.cfm?page=policy.placement.process> (Student Assignment Process). Compare Amended Stipulation and [Proposed] Order Re Modification and Termination of Consent Decree, S.F. NAACP v. S.F. Unified Sch. Dist., No. C-78-1445-WHO at 4 (N.D. Cal. July 11, 2001), available at <http://www.gseis.ucla.edu/courses/edlaw/701settlement.pdf> (approved in S.F. NAACP v. S.F. Unified Sch. Dist., 2001 WL 1922333 (N.D. Cal. Oct. 24, 2001) (October 24, 2001 court order approving stipulation of all parties, which states that "the Index was not required by the Court or any party, but was developed by the school district"))).

138. Only one board member seems prepared at present to drop the Diversity Index. Eddie Chin and David Ho, *Dump the Diversity Index*, S.F. CHRON., Oct. 16, 2003, at A23 (Chin is Vice President of the school board). The rest of the elected board currently supports the Diversity Index. Heather Knight, *Schools' Race Plan Endorsed*, S.F. CHRON., Nov. 13, 2003, at A15 (rejected, by 6-1 vote, superintendent's recommendation to modify Diversity Index to allocate up to 50% of seats in a school for attendance zone residents).

school district's ultimate proposals.

IV. Conclusion

In *Grutter* and *Gratz*, the Supreme Court puts the officials in charge of public elementary and secondary schools in a quandary. *Grutter*'s enthusiastic embrace of race-conscious diversity as a compelling governmental interest is counter-balanced by *Gratz*'s insistence that a formulaic approach using race mechanically will fail the narrow tailoring prong of strict scrutiny analysis. Taken together, as a practical matter, the Supreme Court's two opinions leave public school officials with little choice but to consider adopting a student assignment system which might include racial diversity as one of its many goals, but which does not include race as one of the express means of achieving that goal.

San Francisco's on-going experiment in achieving this delicate balance bears watching nationally because it might show what can (and, perhaps, what cannot) be accomplished with its non-racial Diversity Index. Other school districts may end up emulating San Francisco's experiment, modifying it, or rejecting it. But the Diversity Index concept deserves continued attention. There will be more data to examine and to learn from because the results obtained from using the Diversity Index to assign students will continue to be carefully scrutinized at least until the Consent Decree comes to an end in December 2005. The outcome of the experiment in San Francisco can help school districts nationwide figure out whether this type of controlled choice plan will help balance competing and conflicting interests, as we become a more multicultural and multiracial society.¹³⁹

In concluding my previous article on the San Francisco schools case, I noted that Judge Orrick¹⁴⁰ had used an apt quotation from President John F. Kennedy in his opinion approving the *Ho* settlement in 1999. "All of us do not have equal talent, but all of us should have an equal opportunity to develop our talents."¹⁴¹ The judge went on to capture the essence of the

139. Levine, *supra* note 1, at 144.

140. Judge William H. Orrick, Jr., who had handled the case from its inception in 1978, retired from the federal bench in early 2002. Jason Hoppin, *Orrick Leaves the Bench After Storied Career*, S.F. RECORDER, Feb. 5, 2002, at 3. His last important action in the case was to approve the settlement agreement in October 2001. After twenty-three years of presiding over the case, he turned it over to Judge William H. Alsup. Judge Orrick died in August 2003 at the age of 87. Reynolds Holding, *William Orrick - U.S. District Judge*, S.F. CHRON., Aug. 16, 2003, at A20.

141. Levine, *supra* note 1, at 142 (quoting S.F. NAACP v. S.F. Unified Sch. Dist., 59 F. Supp. 2d 1021, 1023 (N.D. Cal. 1999)).

dispute in the *Ho* and *S.F. NAACP* suits: "In an effort to provide equal opportunity for San Francisco's . . . schoolchildren of exceptionally diverse origins, the parties in these two related desegregation cases have strenuously endeavored to achieve President Kennedy's goal, albeit from sharply differing viewpoints."¹⁴² This still captures the nature of the competing lawsuits very well.

In 2000, I closed my article by noting that, at that time, the school district had "not yet embraced the agreement it made with the other parties to achieve a fair *and* constitutional balance of these interests."¹⁴³ In contrast, with the adoption of the Diversity Index in 2001, in the words of the Independent Monitor, the school district "deserves great credit for its good faith efforts to develop and implement a new student assignment plan under the terms and conditions of the Consent Decree as modified by the Settlement Agreements of 1999 and 2001."¹⁴⁴ The Diversity Index is a work in progress.¹⁴⁵ I anticipate that the school district will be bringing suggested changes to the other parties over the next two years until the Consent Decree finally terminates at the end of 2005. Although one cannot say that the system currently operating in the San Francisco Unified School District has met the expectations of the biggest boosters of socioeconomic diversity,¹⁴⁶ the school district may yet come up with an assignment system which does so. I continue to hope that with the continued good-faith efforts of the school district and the parties, the *Ho* case will indeed be seen as the catalyst for a national public school assignment model, which aims to achieve President Kennedy's goal of equal opportunity for all without intruding on anyone's constitutional rights.¹⁴⁷

142. *Id.*

143. *Id.* at 144.

144. 2003 MONITOR'S REPORT, *supra* note 83, at 22.

145. See *S.F. NAACP v. S.F. Unified Sch. Dist.*, 2001 WL 1922333, at *11 (N.D. Cal. Oct. 24, 2001).

146. Compare KAHLENBERG, *supra* note 101, at 228-57 (discussing practical experiences with socioeconomic integration plans in other communities).

147. Levine, *supra* note 1, at 145.